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No. 606

In the Supreme Court of the United States

OCTOBER TERM, 1930

THE UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM H. SPRAGUE AND WILLIAM J. HOWEY

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE UNITED STATES

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Cases:

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Hawke v. *Smith*, *No. 1*, 253 U. S. 221 — 4, 11–12

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1 Annals of Congress, 761, 768 — 6

The Federalist, No. 85 — 16

Journals of Continental Congress, IX, pp. 907,932 — 15

S. E. Morrison, Massachusetts Constitution of 1780, Proceedings of Massachusetts Historical Society for 1917, p. 400 — 16

Nevins, The American States During and After the Revolution, pp. 128, 129, 183 — 15

Pulliam, The Constitutional Conventions of Virginia, p. 13 — 15

Thorpe, Constitutions & Charters, VI, 3241, 3248, 3737, 3749; VII, 3812 — 15

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OPINION BELOW

The opinion of the District Court (R. 6) has not yet been reported.

JURISDICTION

The judgment to be reviewed was entered December 18, 1930 (R. 37–38), and the appeal to this Court was petitioned for and allowed the same day (R. 38). The jurisdiction of this Court rests upon the provisions of the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682), and Section 238 of the Judicial

Code, as amended by the Act of February 13, 1925. (See Jurisdictional Statement of Appellant, filed December 20, 1930.)

QUESTION PRESENTED

The single question presented is whether the Eighteenth Amendment, which was proposed by Congress for ratification by the legislatures of the States and was ratified by three-fourths thereof, is void because not ratified by conventions called for that purpose in the States.

CONSTITUTIONAL PROVISIONS INVOLVED

Article V of the Constitution provides:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress: Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article X of the Amendments to the Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATEMENT

The appellees were indicted in the District Court of the United States for the District of New Jersey for transporting and possessing fifty half barrels of beer in violation of the National Prohibition Act. (R. 2.) A motion to quash the indictment on the ground that the Eighteenth Amendment, pursuant to which the National Prohibition Act was enacted, is void because not ratified by conventions called for that purpose in the States (R. 3–5), was sustained, and the indictment quashed (R. 37).

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred—

(1) In quashing the indictment.

(2) In holding that the Eighteenth Amendment to the Constitution was invalid, and that the National Prohibition Act, enacted pursuant thereto, is, therefore, unconstitutional and void.

SUMMARY OF ARGUMENT

Article V of the Constitution provides that Amendments shall be valid when ratified by the legislatures of three-fourths of the States, or by Conventions in three-fourths of the States, "as the

one or the other Mode of Ratification may be proposed by the Congress." It was held by the court below that the generality of this language should be modified by "principles of political science" and that an Amendment such as the Eighteenth Amendment could be constitutionally ratified only by conventions in the States.

We submit that the language of Article V is clear and entirely free from ambiguity, and that there is no room for the construction adopted by the court below. This Court has said: "The language of the article is plain, and admits of no doubt in its interpretation." *Hawke* v. *Smith, No. 1,* 253 U. S. 221, 226. Furthermore substantially the present argument was presented to this Court in the *National Prohibition Cases,* 253 U. S. 350, where this Court determined that the Eighteenth Amendment, "by lawful proposal and ratification, has become a part of the Constitution."

ARGUMENT

Article V of the Constitution defines the ways in which that instrument may be amended by declaring that amendments may be proposed by two-thirds of each House of Congress, or by a convention called by Congress upon application of two-thirds of the legislatures of the States, and that the proposed amendments—

> in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conven-

> tions in three fourths thereof, *as the one or the other Mode of Ratification may be proposed by the Congress;* * * *. (Italics ours.)

Although this provision, in language which is susceptible of no ambiguity, vests in Congress the right to determine whether proposed amendments to the Constitution shall be submitted for ratification by the State legislatures or by ratifying conventions in the States, counsel for the defendants contended in the court below that the Eighteenth Amendment could constitutionally be ratified only by the second, or convention, method. In support of that argument two grounds were urged:

(1) That it was the intention of the framers of the Constitution, and therefore must be regarded as impliedly required by that instrument, that all proposed amendments to the Constitution which would confer upon the national government additional direct powers over the people or their rights should be ratified by the people in constitutional conventions; that the Eighteenth Amendment is of that character because it confers upon Congress the power of direct regulation and control over the right of the people to possess and use intoxicating liquors, and that in proposing the Eighteenth Amendment for ratification the power vested in Congress by Article V was accordingly limited so as to require the submission of that amendment for ratification by conventions in the States.

(2) That if not thus impliedly qualified by the original Constitution, the power conferred upon Congress by Article V was so qualified by the Tenth Amendment, which reserves "to the States respectively, or the people" the powers not delegated by the Constitution to the United States nor prohibited by it to the States.

In elaboration of the second point, counsel in their brief filed in the court below (pp. 71–77) referred to proceedings in the House of Representatives when the Tenth Amendment was under consideration by that body. As it emerged from the Committee of the Whole that amendment read:

> The powers not delegated by the Constitution nor prohibited by it to the States, are reserved to the States respectively.

Upon motion of Daniel Carroll of Maryland the words "or to the people" were added at the end of the foregoing clause. 1 Annals of Congress 761. Thereafter, upon motion of Roger Sherman, the words "to the United States" were inserted immediately after the word "delegated," so that the clause read as it now appears in the Constitution. 1 Annals of Congress 768. Although these changes were adopted without debate, counsel argued that they were made with Article V in mind and were designed to require that proposed amendments which would confer upon the national government additional direct powers over the people or their rights should be submitted for ratification by the people, that is, by conventions in the States.

The court below discarded counsel's argument based on the Tenth Amendment. It declared that if, as counsel contended, that Amendment reserved "to the people" the power to make such changes in the Constitution as directly affected the people or their rights, that reservation would not be met by the submission of such amendments for ratification by State conventions, rather than by State legislatures, because neither the one nor the other of these ratifying bodies would be "the people." It further held that as the "power to regulate the conduct of individuals for what is assumed to be the benefit of the general mass," commonly known as the "police power," is inherent in the State, as distinguished from the people, the Tenth Amendment could not have been intended to require ratification by the people, as distinguished from the States, of amendments to the Constitution such as that effected by the Eighteenth Amendment.

Observing, however, that it gave full weight to the development by counsel of the tacit assumptions to be drawn from the historical and theoretical nature of the Federal system, although its own development of those assumptions did not parallel that of the briefs, the court entered into an extensive discussion of the writings and speeches, both in and out of the Convention, of those who took part in the adoption of the Constitution, as well as of the theory and practice existing at that time respecting the establishment and maintenance of constitutional governments, including those of the

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several States, and of the views expounded by writers on popular and representative government, all of which the court assumed was familiar to the framers of the Constitution. Concluding this branch of its opinion, the court said (R. 27):

> It seems indisputable that local self-government, popular sovereignty, and the convention system of drafting and amending constitutions were the very "warp and woof" of the political thought of the whole period prior to the drafting and adoption of the Federal Constitution.

Passing from what it termed the "stereotyped method of constitutional interpretation," and remarking (R. 28) that "We prefer to regard our frame of government as a problem in political science, to be solved as far as may be, according to scientific principles," the court cited and quoted from many publications on political science and other allied subjects as showing that the convention method for ratifying constitutional amendments was required by the principles of that science. Summarizing its conclusions on that subject, it said (R. 29):

> Political science can give only one answer to the question presented by the alternative methods of ratification prescribed by article 5. If the amendment to be considered is one designed to transfer to the United States powers heretofore reserved to the States, or,

> if there are any such, to the people, that answer must be in favor of the convention method."

And again (R. 33):

> We are quite willing to stand flat-footedly on our thesis that the scientific approach to this problem of government requires an approval and ratification of certain amendments by and in a convention, and that the language of article 5 can be taken as modified by the principles of political science before stated.

Whether or not the "tacit assumptions" found by the court to exist in the Constitution because of its political background and because required by the principles of political science would have the effect of restricting the submission of the Eighteenth Amendment to State conventions for ratification if Article V of the Constitution were less clear in its grant of power to Congress to determine which of the alternative modes of ratification therein prescribed should be adopted, we respectfully submit that in the face of the unequivocal language by which that grant is conferred the grounds upon which the court based its decision are plainly untenable.

As stated by this Court in *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S. 601, 618–619:

> The words of the Constitution are to be taken in their obvious sense, and to have a reasonable construction. In *Gibbons* v. *Ogden*, Mr. Chief Justice Marshall, with his

> usual felicity, said: "As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it must be understood to have employed words in their natural sense, and to have intended what they have said."

Similar views were expressed in *Lake County* v. *Rollins*, 130 U. S. 662, 670. While that case involved a construction of the constitution of a State, the Court announced a rule of construction which is fully as applicable here:

> We are unable to adopt the constructive interpolations ingeniously offered by counsel for defendant in error. Why not assume that the framers of the constitution, and the people who voted it into existence, meant exactly what it says? At the first glance, its reading produces no impression of doubt as to the meaning. It seems all sufficiently plain; and in such case there is a well-settled rule which we must observe. The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself; and when the text of a constitutional provision is not ambiguous, the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument.

Moreover, this Court has determined the effect of the ratifying clause of Article V in the following cases:

In *Hawke* v. *Smith, No. 1*, 253 U. S. 221, wherein the ratification of the Eighteenth Amendment was involved, the question presented for decision was whether a provision of the Ohio constitution, extending the referendum to the action of the General Assembly in ratifying proposed amendments to the Federal Constitution, was in conflict with Article V of the Constitution of the United States. Answering this question in the affirmative this Court said (p. 226):

> This article [the Fifth] makes provision for the proposal of amendments either by two-thirds of both houses of Congress, or on application of the legislatures of two-thirds of the States; thus securing deliberation and consideration before any change can be proposed. The proposed change can only become effective by the ratification of the legislatures of three-fourths of the States, or by conventions in a like number of States. *The method of ratification is left to the choice of Congress.* Both methods of ratification, by legislatures or conventions, call for action by deliberative assemblages representative of the people, which it was assumed would voice the will of the people.
>
> The Fifth Article is a grant of authority by the people to Congress. The determination of the method of ratification is the exercise of a national power specifically

> granted by the Constitution; that power is conferred upon Congress, and is limited to two methods, by action of the legislatures of three-fourths of the States, or conventions in a like number of States. *Dodge* v. *Woolsey*, 18 How. 331, 348. The framers of the Constitution might have adopted a different method. Ratification might have been left to a vote of the people, or to some authority of government other than that selected. *The language of the article is plain, and admits of no doubt in its interpretation.* It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed. (Italics ours.)

Hawke v. *Smith, No. 2*, 253 U. S. 231, which was decided upon the authority of the preceding case, differed therefrom only in that it involved the Nineteenth Amendment to the Constitution, extending the right of suffrage to women.

In *Dillon* v. *Gloss*, 256 U. S. 368, it was argued that the Eighteenth Amendment was invalid because of the requirement that it be ratified by the State legislatures within seven years of the date of submission. This Court overruled the contention. After referring in its opinion to the methods provided by Article V for proposing amendments to the Constitution, the Court said (p. 374):

> When proposed in either mode amendments to be effective must be ratified by the legislatures, or by conventions, in three-fourths of the States, "as the one or the other mode

> of ratification may be proposed by the Congress." Thus the people of the United States, by whom the Constitution was ordained and established, have made it a condition to amending that instrument that the amendment be submitted to representative assemblies in the several States and be ratified in three-fourths of them. The plain meaning of this is (a) that all amendments must have the sanction of the people of the United States, the original fountain of power, acting through representative assemblies, and (b) that ratification by these assemblies in three-fourths of the States shall be taken as a decisive expression of the people's will and be binding on all.

It is true that the precise question now raised, namely, whether the Eighteenth Amendment is void because not ratified by conventions in the States, was not involved in the foregoing cases. But the question was presented to the Court in the *National Prohibition Cases*, 253 U. S. 350. Thus in the "Brief of Complainant on Motion to Dismiss" (p. 16), submitted on behalf of the State of New Jersey by its Attorney General, in *New Jersey* v. *Palmer*, No. 30, Original, October Term, 1919, it was urged:

> If any part of this reserved power may be delegated by amendment of the Constitution, to the national government, it must have been the intent of the people if there was any such intent at all, that such alteration should only be made by the calling, through Con-

> gress, of conventions for ratification in three-fourths of the several states. The alternative method for ratification, incorporated in the Article, must be used in such a case if such legislative matter can possibly be incorporated in the Constitution at all.

Numerous other briefs were filed in the *National Prohibition Cases*, several of which advanced arguments quite similar to the position taken by the court below. See, for example, "Brief of Complainant on Motion to Dismiss," in *Rhode Island* v. *Palmer*, No. 29, Original, October Term, 1919, at p. 120; "Brief of Amici Curiae," filed in the same case by Elihu Root and others, at pp. 12–13; and Brief of Alexander Lincoln and Michael J. Lynch, as *amici curiae*, in the same case, at p. 8. See also Article IX (4) of the bill of complaint filed by the State of New Jersey in No. 30, Original, October Term, 1919. For convenience extracts from the briefs referred to above are set out in the Appendix, *infra* pp. 19–22.

The contention thus urged in various forms, that the Eighteenth Amendment is invalid because not ratified by the people through conventions called for that purpose in the States, was rejected by this Court. This Court said (253 U. S. at 385–386):

> The cases have been elaborately argued at the bar and in printed briefs; and the arguments have been attentively considered, with the result that we reach and announce the

following conclusions on the questions involved:

* * * * *

5. That Amendment, by lawful proposal and ratification, has become a part of the Constitution, and must be respected and given effect the same as other provisions of that instrument.

While differing in form, the arguments made in the *National Prohibition Cases* and those made here all rest on the proposition that the character of the proposed amendment determines the mode of ratification, and are alike disposed of by the holding in those cases that the Eighteenth Amendment was lawfully proposed and ratified.

The Articles of Confederation proposed by the Continental Congress were submitted to and ratified by the legislatures and not by conventions in the States (Journals of Continental Congress IX, 907, 932), and these Articles could only be amended in the same manner (Article XIII). In several of the States, constitutions had been adopted by the legislatures without submission to the people. This was true in South Carolina, Vermont, and Virginia. Thorpe, Constitutions & Charters, VI, 3241, 3248, 3737, 3749; VII, 3812; Pulliam, The Constitutional Conventions of Virginia, 13; Nevins, The American States During and After the Revolution, 128. In Massachusetts and in New Hampshire, constitutions had been submitted to town meetings for ratification. Nevins, *supra*, 183;

S. E. Morrison, Massachusetts Constitution of 1780, Proceedings of Massachusetts Historical Society for 1917, p. 400. In no other State prior to 1789 had a constitution been submitted to popular vote. Nevins, *supra*, 128, 129. In five of the States the constitutions provided for amendment by conventions (Pennsylvania, Vermont, Georgia, Massachusetts, and New Hampshire); four had no provisions for amendment (New Jersey, New York, North Carolina, and Virginia), and three provided for amendment by legislative action (Delaware, Maryland, and South Carolina).

The debates in the Federal Constitutional Convention show that the methods for ratification and for amendment of the Constitution were carefully distinguished. Ratification as provided in Article VII was to be by State conventions, but it was left for Congress to determine whether amendments proposed should be ratified by State legislatures or State conventions.

In No. 85 of "The Federalist," Hamilton said:

> Nor however difficult it may be supposed to unite two-thirds, or three-fourths of the State Legislatures, in amendments which may affect local interests, can there be any room to apprehend any such difficulty in a union on points which are merely relative to the general liberty or security of the people. We may safely rely on the disposition of the State Legislatures to erect barriers against the encroachments of the National authority.

In the first session of the First Congress, during the discussion on the proposed amendments to the Constitution, Gerry who had been a member of the Constitutional Convention, said (1 Annals of Congress, 716):

> The conventions of the States, respectively, have agreed for the people, that the State Legislatures shall be authorized to decide upon these amendments in the manner of a convention. If these acts of the State Legislatures are not good, because they are not specifically instructed by their constituents, neither were the acts calling the first and subsequent conventions.
>
> * * * * *
>
> The Legislatures are elected by the people. I know no difference between them and conventions, unless it be that the former will generally be composed of men of higher characters than may be expected in conventions; and in this case, the ratification by the Legislatures would have the preference.

An argument of great weight is found in the practical construction of Article V by Congress since the adoption of the Constitution. Nineteen Amendments to the Constitution have been adopted and at least five additional Amendments have been proposed by Congress. All of these Amendments and proposals were referred by Congress to the legislatures and not to conventions. Of the Amendments, certainly the Thirteenth, and apparently the Sixteenth and Nineteenth, operated to grant powers

to the Federal Government which had formerly been reserved to the States. The proposed Child Labor Amendment was of the same type. The Fourteenth Amendment imposed serious restraints upon the powers expressly reserved under the Tenth Amendment. Yet all of these Amendments were referred by Congress to the legislatures without any suggestion that the Constitution required that they be referred to conventions. We are not aware that the action of Congress in proposing the legislative mode of ratification has ever been challenged except in the case of the Eighteenth Amendment.

CONCLUSION

The judgment of the District Court should be reversed.

Respectfully submitted.

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APPENDIX

In the "Brief of Complainant on Motion to Dismiss," filed in *Rhode Island* v. *Palmer,* No. 29, Original, October Term, 1919, it was argued (p. 120):

> The Legislature of a State, in ratifying an amendment, does not act for the State, and can not relinquish the sovereign powers of the State. The Legislature is a creature and not the creator of a State constitution. The members of a State Legislature have official powers, but they do not participate in sovereignty in any other capacity than as citizens, like other citizens of the State. A State is bound in respect to its sovereign powers only by an explicit act of the whole people. If the sovereign powers of a State reside in the people of the State, so the discretion in the exercise of those powers resides in the people. Congress may not constitutionally propose, therefore, nor may the Legislature of a State constitutionally ratify any proposition as an amendment that involves the exercise or the relinquishment of the sovereign powers of a State. The people of a State alone are competent to an expression of sovereign will.

The "Brief of Amici Curiae," filed in the same case by Elihu Root and others, contains the following argument (pp. 12–13):

> Nor has the reference of proposed amendments to state legislatures under article V in its practical working proved to be an op-

portunity for the people of the United States or of the several States to express their will regarding the proposed eighteenth amendment. Not only have the people of the several States had no opportunity to act upon this proposed amendment, but they have been denied the opportunity, and the amendment has been ratified in entire disregard of the limitations which the people of a large number of the States have imposed upon their legislatures for the purpose of securing an opportunity to act themselves upon important subjects.

* * * * *

Those who assert the validity of these ratifications do not claim that at the time the so-called eighteenth amendment was proposed it was the will of the people of the United States to be represented in matters of constitutional change by the state legislatures. When legislatures acted upon the proposal, they did so, rightly or wrongly, not because the people of their State chose to speak through them, or were in fact represented by them, but solely in the alleged exercise of the agency or authority granted the state legislatures by article V of the Constitution more than a century ago. In some States the action of the state legislature was in express violation of the commands of the people of the State.

In the brief of Alexander Lincoln and Michael J. Lynch, as *amici curiae,* in the same case, it was contended (p. 8):

The eighteenth amendment has not been adopted as an original constitutional provision by the people of the United States. It was not proposed by any constitutional con-

vention, nor has it ever been submitted to the people of the several states, directly or in convention assembled, for ratification. Three sovereign states have declined to ratify the amendment, and the other states have acted solely through their legislatures, even although in a number of states their own constitutions require submission to the people by a referendum. Indeed, so hasty was the action that in many states the people had no chance to express themselves even by a choice of legislators. In the one state, Ohio, where a referendum has been had, the people voted against ratification. It is doubtful whether a majority of the people were ever in favor of the adoption of the amendment.

It is only through the original Constitution, if at all, by virtue of the authority given by Article V, that the will of the people in their constitution-making capacity has been expressed. Our contention is that the so-called eighteenth amendment is not such an amendment as is authorized by Article V, and that it was beyond the power of the amending agency, therein appointed, to propose and ratify such an amendment.

In *New Jersey* v. *Palmer*, No. 30, Original, October Term, 1919, the bill of complaint alleged in Article IX (4):

That the said joint resolution proposing an amendment to the Constitution of the United States was not ratified by the Legislatures of three-fourths of the respective States in the sense and meaning of the use of the term "Legislatures" in the Constitution of the United States as alleged in Article VIII of this bill; and that, in any event, whatever might be the power of the people of the United States acting through

conventions elected for that purpose or otherwise to include in the National Constitution ordinary acts of legislation unalterable by the people of the respective and several States contrary to any grant conferred or delegation of power given in the Constitution, and expressly reserved by the tenth Article of Amendment, * * * such as purports to be exercised by the prohibitions and alleged authority of said so-called Eighteenth Amendment, no such power has been exercised by the people of the United States in respect of such alleged Eighteenth Amendment, but the proposal was submitted, or attempted to be submitted, in the manner provided in Article V of the Constitution in the alleged exercise of a special power conferred by that article contrary to the true intent and meaning thereof, * * *.

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